Crl Rc.No.2103 of 2004

The petitioner/Accused was directed to be released on bail by the order of this Court dated 4.1.2005 and made in Crl.Mp.12850/04 in Crl Rc.No.2103/04.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE :21.06.2007

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

Crl.R.C.No.2103 of 2004

A.N.Mohammed Ibrahim ..Petitioner/accused

vs.

Shahidunnisa
rep. By his power agent
N.Mohideen Sherrif ..Respondent/complainant

This Revision is filed against the Judgment dated 24.11.2004 passed by the Additional District and Sessions Judge,Fast Track Court No.2,Salem in C.A.NO.99 of 2003 confirming the Judgment dated 9.7.2003 passed by the Judicial Magistrate No.3, Salem in C.C.No.393 of 1999.

For Petitioner : Mr.P.Sathish

For Respondent : (Notice served)
None appeared.

O R D E R

This revision has been preferred against the judgment in C.A.No.99 of 2003 on the file of the Additional District and Sessions Judge, Fast track Court, No.2, Salem which had arisen out of the Judgment in C.C.No.393 of 1999 on the file of the Judicial Magistrate, No.3, Salem.

2. The complainant has preferred a private complaint under Section 200 of Cr.P.C. against the accused for an 0ffence punishable under Section 138 of Negotiable Instruments Act,1881(hereinafter referred to " the Act").

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3. The complaint was taken on file by the learned Judicial Magistrate, after taking cognizance of the same and after the accused appeared on summons, copies under Section 207 of Cr.P.C were furnished and when the offence was explained to the accused, the accused pleaded not guilty.

4. On the side of the complainant, P.Ws 1 to 3 were examined and Exs P1 to P13 were marked.

5. P.W.1 is the Manager of Bank of Madura, Shevapet Branch, who would depose that Ex P2 impugned cheque was forwarded by the Indian Bank for collection and that the same was returned with an endorsement that there is no sufficient fund in the account of the drawer of the cheque and that once again the said cheque was forwarded to his bank on 27.1.1999 for collection. Even for the second time, the said cheque was returned for the same reason. Ex P1 is the returned memo along with Ex P2 dishonoured cheque. Ex P3 is the statement of account for the account maintained by the accused.

5b. P.W.2 is the Manager of the Indian Bank. He would admit that Ex P1 cheque was presented in the bank on 27.1.1999 for realisation. But the impugned cheque Ex P2 was dishonoured on the ground that there was no sufficient fund in the account of the drawer.

5c.P.W.3 is the power of attorney for the Complainant Shahidunnisa, the husband of the complainant. He would admit that the accused had borrowed a sum of Rs.75,000/- from the complainant and in order to discharge the said loan amount, the accused had drawn Ex P2 impugned cheque in favour of the complainant. A notice was issued under the original of Ex P6 by the complainant to the accused. Ex P7 is the reply notice. The complainant had sent another notice under the original of ExP8 which was replied by the accused under Ex P9 dated 19.3.1999.

6. When the incriminating circumstances were put to the accused, he denied his complicity with the crime. The accused has examined himself as D.W.1 and Exs D1 to D9 were exhibited.

7. After going through the evidence both oral and documentary, the learned trial Judge has come to a conclusion that the offence under Section 138 of the Act has been proved beyond any reasonable doubt against the accused and accordingly convicted and sentenced the accused to undergo six months simple imprisonment and awarded a compensation of Rs.50,000/- with default sentence. Aggrieved by the findings of the learned trial Judge, the accused has preferred an appeal before the Sessions Judge in C.A.No.99 of 2003 on the file of Additional District and Sessions Judge, Fast Track Court, No.2, Salem. The learned first appellate Court , after giving due deliberation to the submissions made by the counsel appearing for both sides, and after scanning the evidence adduced before the trial Court, has ultimately concurred with the findings of the trial Judge,

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thereby confirming the Judgment of the trial Court, which necessitated the accused to approach this Court by way of this revision.

8. Now the point for determination in this appeal is whether the findings of the learned trial Judge which was confirmed by the first appellate Court in C.A.No.99 of 2003 on the file of the Additional District Sessions Judge, Fast Track Court No.2, Salem holding that the accused is guilty under Section 138 of the Act is sustainable to warrant conviction under the said Act?

9. Heard Mr.P.Sathish, learned counsel for the revision petitioner and considered his submission.

10.The Point:

To warrant conviction under Section 138 of the Act, it must be established that a cheque drawn by a person in order to discharge of any debt or other liability, on presentation was dishonoured by the bank for the reason that the drawer of the cheque had no sufficient money standing to the credit of his account to honour the cheque. Before the trial Court, it is not the case of the revision petitioner that he had raised any defence to the effect that there was no legally enforceable debt or other liability for which the impugned cheque Ex P2 was drawn by him. The accused, while deposing before the trial Court as D.W.1, took a defence that at the time of drawal of the cheque Ex P2 in favour of the complainant, he had handed over the documents relating to his house towards security. He would further depose that apart from the above said documents, he had also handed over five promissory notes to the complainant. He would deny, having drawn a cheque for Rs.75,000/-. But in the cross examination, he would admit that Ex D1 document stands in the name of his father and not in his name. Even though, he would contend that he had discharged the entire hand loan of Rs.75,000/-, he has not even stated the said fact in his reply notice Ex P9. Further, he has not produced any documentary evidence to show that he had already discharged the loan amount of Rs.75,000/-. In Ex P9, he would contend that he had borrowed the loan only from Mohideen Sherrif, the husband of the complainant. A perusal of Ex P2 cheque will go to show that it has been drawn only in the name of the complainant Shahidunnisa. The presumption under Section 139 of the Act is that only after receiving the consideration, Ex P2 impugned cheque was drawn by the accused in favour of the complainant.

11. Taking into consideration of the above said facts only both the Courts below have concurrently held that the offence under Section 138 of the Act has been made out against the accused and accordingly convicted the accused under Section 138 of the Act.

12. Now coming to the question of sentence, the trial Court has convicted the accused and sentenced to undergo six months simple imprisonment and also awarded a compensation of Rs.50,000/- with default sentence. In a case of similar nature, the Honourable Apex Court in Goa Plast (P) Ltd.,-v- Chicl Ursula D'Souza(2004)2 Supreme Court Cases 235) has held as follows:

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. . . . .Thus it has to be presumed that a cheque is issued in discharge of any debt or other liability. The presumption can be rebutted by adducing evidence and the burden of proof is on the person who wants to rebut the presumption. This presumption coupled with the object of Chapter XVII of the Act which is to promote the efficacy of banking operation and to ensure credibility in business transactions through banks persuades us to take a view that by countermanding payment of post-dated cheque, a party should not be allowed to get away from the penal provision of Section 138 of the Act. A contrary view would render Section 138 a dead letter and will provide a handle to persons trying to avoid payment under legal obligations undertaken by them through their own acts which in other words can be said to be taking advantage of one's own wrong.....We have no doubt that the respondent has committed an offence punishable under the provisions of Section 138 of the Act and is liable to be punished. The transaction in question took place between the parties in the year 1993, therefore, Section 138, as it stood at the relevant time, would be applicable to the present case. Section 138 provides imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both,. Section 138 has now been amended and the penalty of imprisonment for a term which may extend to one year has been substituted by two years as provided by the amending Act of 2002 and the fine which may extend to twice the amount of the cheque. This has been prescribed as the punishment for the offence under Section 138 of the Act..The object and the ingredients under the provisions, in particular, Sections 138 and 139 of the Act cannot be ignored. Proper and smooth functioning of all business transactions, particularly, of cheques as instruments, primarily depends upon the integrity and honesty of the parties. In our country, in a large number of commercial transactions, it was noted that the cheques were issued even merely as a device not only to stall but even to defraud the creditors. The sanctity and credibility of issuance of cheques in commercial transactions was eroded to a large extent. Undoubtedly, dishonour of a cheque by the bank causes incalculable loss, injury and inconvenience to the payee.

Ultimately, the appeal was disposed of by the Honourable Apex Court by awarding Rs.80,000/- (twice the amount of the cheque) as compensation to

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the claimant giving a months time for payment to the accused with default sentence. If we follow the same yardstick in the case on hand also, then the accused is liable to pay a sum of Rs.1,50,000/-(twice the amount of the cheque) to the complainant. But it is on record that the accused has already paid a sum of Rs.25,000/- as per order of this Court in Crl.M.P.No.12850 of 2004 in Crl.R.C.No.2103 of 2004.

13. Following the principle enunciated in the above said dictum,I am of the view that instead of giving any sentence, the accused can be directed to pay twice the amount of the cheque in this case also. The point is answered accordingly.

14. In the result, the revision is disposed of as hereunder. The findings of the first appellate Court in C.A.No.99 of 2003 on the file of the Additional District and Sessions Judge,fast Track Court, No.2, Salem is set aside. While convicting the accused under Section 138 of the Act, six weeks time from this date is given to the petitioner/accused herein to pay a sum of Rs.1,25,000/-(Rupees One Lakh twenty five thousand only) (twice the amount of the cheque, after giving credit to the payment of Rs.25,000/- already made by the accused as per the directions of this Court) towards compensation to the complainant/respondent,in default, thereof, the petitioner/accused shall suffer simple imprisonment for six months.

sg

Sd/-
Asst.Registrar

/true copy/

Sub Asst.Registrar

To,

1.The Additional District Sessions Judge,
Fast Track Court,No.2, Salem.

2. The Judicial Magistrate No.3, Salem.

3.-do- the Chief Judicial Magistrate, Salem.

4. The Superintendent,Central Prison, Salem.

5. The Principal Sessions Judge, Salem.

+1 cc to Mr.P.Sathish, Advocate Sr.No.36793.

SMV(CO)
dcp/22.6.07

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